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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GICC CAPITAL CORP.,

Petitioner,

vs.

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS, WILLIAMSON, GRAHAM & WILLIAMSON, GORDON LOCKE, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, TFG ACQUISITION CORP. and ARTHUR KRONENBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether 18 U.S.C. § 1961(5) of the Racketeering Influenced and Corrupt Organizations Act, which defines a "pattern of racketeering activity" as at least two acts of racketeering activity that occur within a ten-year period, should be subject to artificial, non-statutory barriers, such as a one-year temporal requirement, or a civil-criminal case distinction, in conflict with statutory text, legislative history, and Supreme Court precedent, and aggravating an existing split of authority within and among the Circuits.

Whether a "pattern of racketeering activity" is stated under RICO by allegations of a two-year fraudulent conveyance scheme which ended only when available funds had been looted and the district court entered a restraining order barring overseas transfers of looted funds.

LIST OF THE PARTIES' AFFILIATES

All parties appear in the caption of the case on the cover page. There are no parent companies or non-wholly owned subsidiaries of petitioner. Upon information and belief, there are no parent companies or non-wholly owned subsidiaries of respondents.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

GICC Capital Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-11a) is reported at 67 F.3d 463 (2d Cir. 1995). The Court of Appeals' denial of GICC's Petition for Rehearing and Suggestion of Rehearing *En Banc* (App., *infra*, 12a) is unreported. The opinion of the District Court (App., *infra*, 25a-29a) is

reported at 891 F. Supp. 64 (D. Conn. 1994). A prior appeal in the case is reported at 30 F.3d 289 (2d Cir. 1994).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on October 6, 1995 (App., *infra*, 1a-11a). The Court of Appeals denied a timely Petition for Rehearing and Suggestion of Rehearing *En Banc*, on January 3, 1996 (App., *infra*, 12a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED[1]

Section 1961(5) of RICO, the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, defines a "pattern of racketeering activity" as at least two acts of racketeering activity that occur within a ten-year period.

Section 1961(1) of RICO defines "racketeering activity" as a variety of illegal acts, including mail fraud, wire fraud and bankruptcy fraud.

Section 1962(a) of RICO renders it unlawful for any person to use or invest income derived "from a pattern of racketeering activity" in acquisition of an interest in, or in operation of, an enterprise engaged in interstate commerce.

Section 1962(b) of RICO renders it unlawful for any person through a "pattern of racketeering activity" to acquire or maintain, directly or indirectly, any interest in or control of an enterprise engaged in interstate commerce.

Section 1962(c) of RICO renders it unlawful for any person employed by or associated with an enterprise engaged in interstate commerce, to conduct or participate in the conduct of the enterprise's affairs, directly or indirectly, through a "pattern of racketeering activity."

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[1] The pertinent text of the statutory provisions involved in this case are set out verbatim in the Appendix, *infra*, 31a-32a.

Section 1964(c) of RICO provides that any person injured in his business or property by reason of a violation of Section 1962 is entitled to a treble damage remedy, plus costs and attorneys' fees.

STATEMENT OF THE CASE

This case involves a multi-faceted scheme of fraudulent conveyance activity occurring over a more than two-year period pursuant to which the Respondents systematically transferred millions of dollars in cash and assets from respondent Technology Finance Group, Inc. ("TFG") to respondent Creative Resources, Inc. ("CRI") and its subsidiaries and affiliates, including respondent Apple Leasing, Inc. ("Apple"), in derogation of the right of GICC and TFG's other creditors. Respondents' gross misconduct was accomplished through a "pattern of racketeering activity" which involved settlement fraud, corporate restructuring, repurchases of multiple investor interests, domestic and overseas transfers of cash and assets, SEC filings, and as a fait accompli, the sale of TFG to a worthless shell. The net effect of the scheme is that CRI stripped TFG of its assets, leaving TFG insolvent, and ensuring that TFG would be unable to meet its obligations to its multiple creditors, including one of its primary creditors, GICC.

The fraudulent scheme was engineered by individual respondents Andrew Graham ("Graham"), Dennis Williamson ("Williamson") and Gordon Locke ("Locke"), through their corporate vehicles, respondents CRI, Graham & Williamson ("G&W"), Apple, and TFG, and accomplished with the approval of CRI's Board of Directors, which included respondents James T. Pierce ("Pierce") and Walter H. Prime ("Prime"). It was completed with the assistance of respondent Arthur Kronenberg ("Kronenberg"), whose shell entity, TFG Acquisition Corp. ("TFG Acquisition"), purchased TFG for nominal consideration in February, 1991, and contemporaneously released CRI, Apple and TFF, Inc. ("TFF") from any and all claims that TFG might have against them. As a result of Respondents' fraudulent scheme, GICC is left holding a worthless promissory note from TFG.

GICC's complaint alleges, among other things, a pattern of racketeering activity, violating 18 U.S.C. §§ 1961 *et seq.*, arising from Respondents' series of fraudulent conveyances each comprised of multiple RICO predicate acts, occurring over a two-year period (the "Complaint"). Accordingly, the subject matter jurisdiction of the district court was predicated upon federal question jurisdiction, 28 U.S.C. § 1331, arising under 18 U.S.C. § 1964(c) (RICO).

A. The Fraudulent Conveyance Scheme

Respondents' scheme had six principal components (App., *infra*, 37a-52a).

1. Settlement Fraud

In early 1990, GICC was actively pursuing claims against TFG. That litigation resulted in a settlement, in March of 1990, when Respondents induced GICC to accept delivery of a $500,000 back-end loaded promissory note (the "GICC Note") (App. *infra*, 38a-39a). At no time during the negotiation of the terms of issuance of the GICC Note did Respondents ever disclose that, at the same time they were agreeing to cause TFG to issue the GICC Note, they intended to strip TFG of sufficient assets to meet the obligations contained in the GICC Note (App., *infra*, 55a-56a). As is set forth below, even prior to Respondents' March 1990 settlement with GICC, they had already begun, unbeknownst to GICC, to loot TFG (App., *infra*, 37a-38a).

The back-end loading of GICC's promissory note was of importance to Respondents. By structuring the note to accrue interest in 1990, adding the interest to principal, and providing for interest-only payments during 1991, with interest and principal amortization not starting until 1992, Respondents gave themselves almost two years to complete their stripping of TFG's assets before significant payments became due to GICC.

Not long after commencing principal payments, TFG defaulted on the GICC Note, thus entitling GICC to declare the Note in default on December 10, 1992 (App., *infra*, 38a-39a). No payment has been made by TFG since then. As a result,

there is now due and owing to GICC the sum of $407,021.07 with per diem interest of $110.66 from December 28, 1992 (App., *infra*, 39a, 53a). In addition to this default, because of CRI's fraudulent transfers, TFG is unable to meet its remaining payment obligations on the GICC Note.

Respondents' failure to disclose their plan to strip TFG of assets is alleged to have been willful and fraudulent. (App., *infra*, 36a-52a). Had GICC known of Respondents' plan to strip TFG of assets it would not have accepted the Note, at least not without a guarantee from CRI (App., *infra*, 55a-56a). The mails and wires of course had to be used to accomplish these transactions.

2. Corporate Restructuring

In mid-1989, Respondents took control of CRI to loot it and its affiliates (App., *infra,* 37a-38a). One of CRI's subsidiaries, TFG, was in the computer leasing business. TFG purchased computer equipment, borrowed funds on a non-recourse basis to make the purchase, and then leased the equipment to an initial end-user for a specified period of time. TFG then typically sold the computer equipment, in a sale-and-leaseback transaction to an investor, such as an equipment trust. The term of the investor lease was for a longer period of time than the initial end-user lease, enabling TFG to remarket the computer equipment from the end of the end-user lease until the end of the investor's lease, for an agreed-upon sharing of the re-marketing proceeds (also called the "residuals") (App., *infra*, 36a-37a).

TFG also had its own subsidiary, Apple. During the same time that TFG was sued by an affiliate of GICC, the settlement of which resulted in the issuance of the GICC Note, respondents Graham, Williamson and Locke caused TFG to transfer Apple to CRI (App., *infra*, 40a). The purchase price was $10,000 -- which is, in a commercial context, nominal consideration. The purpose of this "sale" was to enable any monies collected by Apple to be transferred directly to CRI rather than having to be sent through TFG, which would have subjected these monies to TFG's creditors, including GICC.

Instead of indirect ownership of Apple through TFG, CRI then had direct ownership of Apple in a parallel relationship with TFG, giving CRI the opportunity to loot TFG (App., *infra*, 40a, 45a-47a).

By transferring Apple, CRI was able to route transactions through that entity without changing CRI's consolidated financial reporting position, and without having to subject those transactions to claims of TFG's creditors, including GICC (App., *infra*, 40a). Profits made by Apple, which otherwise would have to be dividended through TFG, could be dividended to CRI directly, bypassing TFG and its creditors. These corporate restructuring transactions inevitably involved the use of the mails and wires. They marked the mid-1989 beginning of Respondents' scheme.

Significantly, Respondents accomplished the mid-1989 transfer of Apple prior to the March 1990 delivery of the GICC Note, and failed to disclose this material corporate restructuring to GICC during the settlement negotiations leading up to the GICC Note (App., *infra*, 37a-40a). Upon execution of the GICC Note, GICC believed that Apple was still a subsidiary of TFG. Had GICC been aware of the Apple transfer, and the fraudulent conveyances which had at that time just begun, GICC would not have accepted the Note, at least not without a guarantee from CRI (App., *infra*, 55a-56a). The reason it was so important for Respondents to placate GICC was that, as a restive creditor, GICC threatened the early 1990 unravelling of the then-young scheme.

All of these transactions inevitably involved the use of the mails and wires. No corporate restructuring can be accomplished without some use of the mails and wires having been made.

3. Repurchase of Multiple Investor Interests

Beginning in February, 1990, Apple embarked on a program devised by Graham and Williamton and run by Locke to repurchase the interests of investors in leased equipment (App., *infra*, 40a-41a). Respondents Williamson, Graham and Locke,

with the approval of the CRI Board, caused CRI to lend Apple money -- hundreds of thousands of dollars -- to purchase these investors' interests (App., *infra*, 40a-43a). Apple would then earn substantial profits on these repurchase transactions -- totalling more than $1 million -- that should have gone instead to TFG. Had Apple not been sold by TFG to CRI, the "upstreaming" of these Apple profits would have gone to TFG, and its creditors (App., *infra*, 40a-43a, 45a).

TFG would advise investors, by mail, and/or then by telephone, that the investors' interests were worth very little (App., *infra*, 41a). If the investor agreed to sell his interest, then TFG would mail a check to that investor. If TFG could make these purchases cheaply, it would profit to the extent that actual remarketing proceeds from computer equipment exceeded the purchase price paid by TFG to buy back the investor's interest in the equipment. The obvious and only explanation for structuring the transactions in the manner in which they were structured was to enable TFG to be "bypassed" (App., *infra*, 41a, 45a-47a).

Respondents' scheme was comprised of dozens upon dozens of such looting transactions, each involving multiple investor purchases and multiple uses of the mails and wires. A typical example was the SCB trust (App., *infra*, 42a-43a). There, thirteen investor interests had been established by TFG to own and lease computer equipment. CRI caused Apple to repurchase twelve of those interests, for a total of less than $10,000 in cash, notes and stock. Within approximately one month, CRI realized, through Apple, approximately $800,000 on the sale of equipment (App., *infra*, 42a). Respondents did not disclose to the investors that an offer to sell the equipment for a eighty-fold profit was pending when the investor trust interests were repurchased (App., *infra*, 42a). Many other similar examples could be cited, involving other trusts and investors.

This typical transaction illustrates the magnitude of the fraudulent conveyances, and the variety of the means by which Respondents accomplished their scheme to obstruct repayment of TFG's debts to GICC and other creditors.

Inherent in each of the fraudulent conveyances committed by Respondents are a multitude of separate violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (App., *infra*, 57a-58a). The scheme involved not only the corporate restructuring of CRI, to move Apple away from TFG, but also multiple interest re-purchases and multiple transfers of funds between CRI and Apple, each of which inevitably involved multiple checks and bank transfers, enabling Respondents to funnel the resulting profits away from TFG and its creditors, including GICC (App., *infra*, 37a-38a, 40a-47a).

Respondents' fraudulent scheme is actually set forth in CRI's public filings with the SEC (App., *infra*, 45a-51a), albeit in a fashion which is almost impossible to understand. For example, in its July, 1991 10-K filed with the SEC, CRI stated an increase in cash that was due in large part to TFG lease residuals which were funneled through Apple, and then on to CRI, and from TFG residuals which were also transferred to CRI directly (App., *infra*, 45a).

Further, in its Form 10-K for the year ended March 31, 1990, which was not filed with the SEC until December 4, 1990, CRI stated that it was meeting its "working capital requirements . . . from collections by the Company from its lease portfolio" (App., *infra*, 46a). This means that CRI, and its subsidiary TFG, were taking lease residuals collected by TFG (on behalf of TFG's investors) and then transferring those monies either to Apple and then on to CRI, or to CRI directly, keeping those lease residuals as CRI's own and using those residuals for CRI's operating expenses rather than paying the residuals over to investors, or using them to pay claims against TFG (App., *infra*, 46a-47a).

In addition, in the March 31, 1990 10-K, CRI stated that it was "borrowing funds from and deferring payment to limited partnerships managed by TFG's subsidiary," admitting that it was taking monies from lease residuals from TFG and Apple and not paying those monies to investors who were entitled to them (App., *infra*, 45a-46a).

4. Subordination of GICC's Debt to CRI and Insolvency of TFG

Throughout 1990, Apple and TFG transferred huge sums of monies to CRI to allegedly discharge intracorporate debts (App., *infra*, 41a-42a). First, Williamson admitted in an affidavit, dated September 24, 1991, that TFG sent approximately $3.1 million to CRI from the period January 1989 to January 1991. Further, during discovery, GICC learned that from January 1990 through January 1991, Apple transferred over $1 million to CRI (App., *infra*, 45a-50a). These monies were paid to CRI on a preferred basis, where any "debts" owed by TFG or Apple to CRI should have been subordinated to claims of the general creditors of the entities, including GICC. In addition, because these monies rightfully belonged to TFG and its creditors, this repayment accentuated TFG's insolvency (App., *infra*, 46a).

5. Sale of TFG to a Worthless Shell Company for Nominal Consideration

In order to make it that much more difficult for TFG's creditors to recover from TFG, on February 1, 1991, CRI's shell subsidiary, TFF, with the approval of CRI's directors and officers, sold TFG to another company with no assets, TFG Acquisition, a shell company owned by Kronenberg (App., *infra*, 44a-45a, 47a-48a, 51a-52a). Kronenberg's worthless entity, TFG Acquisition, purchased TFG for $10,000 -- the same price CRI "paid" for Apple -- and CRI "forgave" over $1.1 million owed by TFG to CRI.

The purpose of this transaction was to strip away TFG from CRI and to give away TFG so that (i) CRI did not have to report an insolvent subsidiary as a part of its consolidated financial statement, which Williamson admitted in his affidavit and at his deposition; (ii) TFG could go bankrupt without directly affecting CRI; and (iii) it would be that much more difficult for TFG's creditors to recover against TFG (App., *infra*, 44a-45a, 47a-48a). Thus, having stripped TFG clean,

Respondents set it adrift, and even caused TFG to give to CRI a non-arm's length release.

Here, too, the mails and wires had to have been used.

6. Transfer of Assets Out of the Country

CRI transferred in excess of $1 million to its foreign subsidiaries, making it still more difficult to recover those assets (App., *infra*, 44a, 50a-51a). This transfer of assets abroad continued even after GICC's service of its Complaint, and while GICC's motion to restrain such transfers was pending but had not yet been heard by the district court.

Thus, while these funds were still in CRI on a consolidated financial reporting basis, Respondents made it more difficult to recover those proceeds for the benefit of GICC and TFG's other unsecured creditors by moving the proceeds offshore, even after being served with the Complaint, and even one day prior to a September 1991 hearing with the district court below, where that court issued a restraining order against overseas transfers. (App., *infra*, 44a). These transfers also required the use of the mails and wires.

The net effect of this fraud on TFG's creditors was the diversion and funnelling by CRI of more than $2 million in cash into CRI, from mid-1989 through September of 1991 (App., *infra*, 43a-44a). As a result, TFG was left insolvent and TFG's creditors were left without adequate sources of repayment. The transfers have left TFG with virtually no cash since all, or almost all, of its cash was funnelled to Apple and then to CRI, or to CRI directly, and TFG's liabilities substantially exceeded its assets. Respondents have admitted TFG's insolvency.

This scheme was aimed at all of TFG's many creditors. In its early stages, however, GICC became TFG's most restive creditor, and it brought a prior lawsuit. GICC did not know about the transfer of Apple at the time. It also did not know that CRI was causing the repurchase of trust investor interests at a substantial profit, creating a pool of money as a source of possible payment, but then divesting those proceeds away

from TFG. All GICC knew was that it was not being paid. TFG quickly settled the litigation in March of 1990, for some cash plus delivery of a back-end loaded promissory note to GICC. By structuring the settlement in this way -- particularly with respect to the back-end loaded promissory note -- Respondents succeeded in keeping GICC at bay while they completed the looting. Special actions directed at GICC therefore were critical to the success of Respondents' scheme.

B. Proceedings Below

GICC served its Complaint on September 13, 1991,[2] setting forth six causes of action, including a claim alleging a pattern of racketeering activity under RICO, 18 U.S.C. §§ 1961, *et seq.*

After initial skirmishing by the parties, which resulted in a temporary restraining order ("TRO") restricting Respondents from transferring monies abroad, the Respondents served motions to dismiss the Complaint, on October 25, 1991 and November 12, 1991. On February 4, 1992, United States Magistrate Judge Arthur H. Latimer issued a ruling recommending that Respondents' motions to dismiss be granted. The Magistrate Judge adopted Respondents' argument that, because there had not been at that point a default in the GICC Note, there was no cognizable injury.

On February 28, 1992, GICC filed a timely objection to the Magistrate Judge's ruling before the United States District Court for the District of Connecticut, District Judge Warren W. Eginton (the "District Court"). While the objection was pending before the District Court, TFG in fact defaulted on the GICC Note in December of 1992. As a result of the default on the Note, the District Court referred the matter back to Magistrate Judge Latimer, by order dated January 28, 1993.

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[2] GICC served an Amended Complaint on March 24, 1993, incorporating a cause of action against TFG for its default on the GICC Note (App., *infra*, 33a-59a).

On June 15, 1993, Magistrate Judge Latimer again issued a ruling recommending that Respondents' motions to dismiss be granted, this time on the ground that GICC lacked standing under RICO because Respondents' looting harmed TFG, and GICC's harm, as a creditor of TFG, was merely derivative. GICC submitted a timely objection to this recommended ruling on July 23, 1993. On August 27, 1993, District Judge Eginton affirmed the recommended ruling, and a final judgment was entered by the District Court in favor of all Respondents and against GICC on August 31, 1993.

GICC filed a timely notice of appeal from the final judgment of the District Court on September 13, 1993. On July 11, 1994, the Second Circuit reversed the decision of the District Court in favor of GICC and against all Respondents in all respects. The Second Circuit held that, based on the "timing," "magnitude" and "rapacious nature" of Respondents' alleged looting, GICC's Complaint satisfied the directness of injury required for RICO standing (App., *infra*, 13a-22a). *GICC Capital Corp. v. Technology Finance Group*, 30 F.3d 289, 293 (2d Cir. 1994).

On August 12, 1994, Respondents renewed their motions to dismiss, for a third time. On December 21, 1994, District Judge Eginton, again granted dismissal of GICC's Complaint on the ground that it did not sufficiently plead a pattern of racketeering activity (App., *infra*, 25a-29a), *GICC Capital Corp. v. Technology Finance Group*, 891 F. Supp. 64 (D. Conn. 1994), and a final judgment was entered by the District Court in favor of all Respondents and against GICC on December 28, 1994 (App., *infra*, 30a).

GICC filed a timely notice of appeal from the final judgment of the District Court on January 19, 1995. The Second Circuit affirmed the decision of the District Court, on October 6, 1995 (App., *infra*, 1a-11a). *GICC Capital Corp. v. Technology Finance Group*, 67 F.3d 463 (2d Cir. 1995). The Court of Appeals held that GICC had not satisfied RICO's "pattern" requirement. Applying a one-year temporal requirement and a stricter construction of the "pattern" element in the case of a

civil RICO action, as compared with criminal prosecutions, the Second Circuit held that GICC had not stated either closed-ended or open-ended continuity so as to adequately allege a pattern under RICO (App., *infra*, 6a-10a). Likewise, on January 3, 1996, the Court of Appeals denied a timely Petition for Rehearing and Suggestion *En Banc* (App., *infra*, 12a).

Accordingly, the question presented here is whether a one-year temporal requirement, a civil-criminal RICO distinction, or a timing of the termination restriction, should preclude a multi-faceted fraudulent conveyance scheme -- involving dozens of transactions, multiple violations of the mail and wire fraud statutes, and the intentional looting of millions of dollars by and among four corporate entities, a partnership and six individuals -- from being pled as a "pattern of racketeering activity" under civil RICO.

REASONS FOR GRANTING THE PETITION

Seven years after this Court last deliberated on the meaning of the term "pattern of racketeering activity," the "widest and most persistent Circuit split on an issue of federal law," as then described by members of this Court continues to plague our judicial system. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, Rehnquist, O'Connor and Kennedy, JJ., concurring). The Second Circuit's decision below (App., *infra*, 1a-11a) exemplifies the confusion faced by the lower courts and their resulting inability to apply in a consistent manner the enigmatic "pattern" element enunciated by Congress and construed by this Court. Conflicting decisions that expound artificial barriers unsupported by the statute or this Court's precedent -- for example, distinguishing activities by their "inherently unlawful" nature,[3] or applying a

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[3] *See, e.g., United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995) (applying less stringent standard to a three-and-a-half month scheme that was characterized as "inherently unlawful"); *see also, infra*, part II.B.

"bright-line, one-year rule"[4] -- continue to proliferate rapidly in and among virtually all circuits. Recognizing that Congress has left the judiciary with significant ambiguity in regard to a key statutory element, GICC is sympathetic to the difficulties faced by the lower federal courts in providing meaning to RICO's "pattern" requirement. Understandably, the need for guidance from this Court is acute. Considering the nature and number of persons ultimately affected by the statute's criminal sanctions and civil remedies, the issue that this case addresses is important and the continuing conflicts in and among the circuits warrant clarification by this Court.

I. The Second Circuit's Narrow Interpretation of RICO's "Pattern" Requirement Conflicts With the Statute's Broad Reach As Well As With this Court's Construction of the Statute

Congress incorporated into RICO a liberal construction clause[5] in order to combat fraudulent and other illegitimate activities. As a deterrence mechanism and a stimulant to private enforcement, Congress also included a treble-damage award and reasonable attorneys' fees for anyone injured in his business or property by reason of a "pattern of racketeering activity." 18 U.S.C. §§ 1962, 1964(c). The statute defines a "pattern" to "require[] at least two acts of racketeering activity . . . within ten years . . . ." 18 U.S.C. § 1961(5).

On each of the six occasions that this Court has considered the scope of RICO, it has upheld the literal and far-reaching meaning of the statute and expressly declined to interpret

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[4] *See, e.g., Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) ("a bright line, one-year rule undermines *H.J. Inc.*'s principle that flexibility rather than rigidity should govern the application of RICO"); *see also, infra*, part II.A.

[5] The liberal construction clause directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." 84 Stat. 947 (1970). Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 1970 U.S.C.C.A.N. (84 Stat.) 4036 (codified as amended at 18 U.S.C. § 1961 *et seq.*).

RICO restrictively or to engraft limitations not found within the four corners of the statute.[6] This Court's approach to the key "pattern" element is exemplified by its seminal decisions in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), both of which are implicitly ignored by the Second Circuit's narrow reading of the "pattern" requirement in its decision in this case below. These two decisions demonstrate that Respondents' conduct, as alleged here, falls squarely within RICO's "pattern" requirement.

Sedima eliminated significantly judicially created restrictions on "garden variety" civil RICO suits, holding that such claims did not require both a prior criminal conviction and proof of a special "racketeering injury."[7] 473 U.S. at 493. In rendering this decision, the Court emphasized that the statutory text did not support, and legislative history did not envision, such a narrow reading of the statute. *Id.* The Court's "pattern" analysis was equally compelling. While intimating that a more meaningful concept of pattern was necessary, the Court declined to rewrite the statute. *Id.* at 499-500. The Court noted that "while two acts [of racketeering activity] are necessary, they may not be sufficient" to form a pattern. *Id.* at 496 n.14. Thus, in order to prevent the application of RICO to two "isolated" acts of racketeering activity, a "continuity plus relationship" should be applied to determine the existence of a

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[6] *See National Organization for Women, Inc. v. Scheidler*, ____ U.S. ____, 114 S. Ct. 798, 803, *reh'g denied*, ____ U.S. ____, 114 S. Ct. 1340 (1994) (scope of enterprise and pattern elements); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (standing limitations); *H.J. Inc. v. Northern Bell Tel. Co.*, 492 U.S. 229 (1989) (pattern element); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (standing limitations; pattern element, in dicta); *Russelo v. United States*, 464 U.S. 16 (1983) (scope of forfeiture); *United States v. Turkette*, 452 U.S. 576 (1981) (scope of enterprise element).

[7] In *Sedima*, a foreign corporation that had entered into a joint venture with an American corporation commenced a civil-RICO action when it believed that it was being cheated out of a portion of its revenues by the American corporation's alleged overbilling. 473 U.S. 479, 483-484.

"pattern." *Id.* (quoting Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969)). No further requirements were construed or applied by this Court.

In rendering its opinion, the Court expressly acknowledged that, while its ruling might broaden the statute's application, such a liberal construction is consistent with the remedial principles underlying the RICO statute.

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expanded language and overall approach, . . . but also of its express admonition that *RICO is to be liberally construed to effectuate its remedial purposes*. . . . The statute's remedial purpose is nowhere more evident than in the provision of a private action for those induced by racketeering activity.

Id., 473 U.S. at 497-498 (emphasis added) (citations omitted). Moreover, even if section 1964(c) of RICO was "evolving into something quite different from the original conception of its enactors" and was "being brought almost solely against such respondents [respected businesses], rather than against the archetypal, intimidating mobster," this Court determined that "this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress." 473 U.S. at 499.

This Court in *H.J.* attempted further to develop a meaningful concept of "pattern." Holding that a "pattern of racketeering activity was established,"[8] the Court expressly rejected the Eighth Circuit's restrictive "multiple scheme" interpretation of the "pattern" requirement,[9] finding no basis for it in either

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[8] In *H.J.*, the customers of a telephone company brought a class-action lawsuit, alleging that the company gave members of the state utility commission numerous bribes, with the single objective of causing commissioners to approve unfair and unreasonable rates. 492 U.S. 229, 233-35.

[9] The Court of Appeals for the Eighth Circuit, in affirming the District Court's dismissal of plaintiffs' complaint, held that "[a] single fraudulent

(Footnote continued)

the statute or the legislative history. 492 U.S. at 240-41. Instead, the Court adopted the liberal conception of "pattern" recognized by *Sedima*, holding that to prove a "pattern of racketeering activity," a plaintiff "must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity." *H.J.*, 492 U.S. at 239.

For analytical purposes, the *H.J.* Court separately defined the constituents of RICO's "pattern" requirement, namely "continuity" and "relatedness," while recognizing that, in practice, their proof will overlap. *Id.* The Court explained that the interrelationship between acts may be established in a number of ways, including proof of their similarity of goals, results, participants, victims, methods of accomplishment, or otherwise distinguishing characteristics. *Id.* at 240. Like relatedness, the Court recommended a flexible approach to continuity, describing "both a closed- and open-ended concept, [which] refer[s] either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition . . . ." *Id.* at 241.

Notwithstanding the Court's attempt at a "meaningful concept," the concurring judges severely criticized the majority opinion for having done "little more than repromulgate . . . hints as to what RICO means . . . ." *H.J.*, 492 U.S. at 251 (Scalia, Rehnquist, O'Connor, Kennedy, JJ., concurring). Characterizing the decision's resulting uncertainty and vagueness as "intolerable," the concurring opinion correctly predicted that the courts of appeals will be no more "unified in the future, than they have in the past, regarding the content of this law." *Id.* at 255.

GICC submits that the broad requirements of "pattern" articulated in *Sedima* and *H.J.* are clearly satisfied by GICC's

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effort or scheme is insufficient" to establish a "pattern of racketeering activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989). This Court expressly rejected this narrow reading of the RICO statute, and reversed the decision. *H.J.*, 492 U.S. 229, 250.

Complaint, which alleges that Respondents, as part of their scheme to defraud TFG's creditors, committed a multitude of fraudulent conveyances during a more than two-year period. By narrowly interpreting the statute and applying artificial barriers, such as a one-year minimum requirement, an "unlawfulness" qualification, and an inconsistent view with respect to the magnitude and extent of the racketeering activities, the Court of Appeals' decision below runs counter to the statute, the legislative history, and this Court's precedent.

II. The Second Circuit's Decision Aggravates the Existing Split of Authority Within and Among the Circuit Courts

As predicted by the concurring opinion in *H.J.*, this Court's RICO decisions have continued to generate controversy, particularly with regard to the "pattern" concept. Absent long-awaited Congressional reform, the federal courts have vented their frustration, understandably, by seeking to develop their own solutions. Many decisions, including the Court of Appeals' below, have disregarded Supreme Court directives regarding the breadth of RICO and reined in the statute by imposing, in an inconsistent and unpredictable manner, artificial barriers that are unsupported by statutory text, legislative history or Supreme Court precedent. The result is utter confusion and a complete lack of uniformity. Absent review by this Court, these difficulties will only worsen, with increasing disarray among the lower courts, and without any realistic prospect for resolution of the decisional conflict.

For example, in an effort to limit civil RICO's reach, many lower courts have imposed overly restrictive standards for what constitutes a pattern and have arbitrarily rejected "pattern" claims on the following grounds: (i) the absence of at least one year of racketeering activity; (ii) the absence of "inherent unlawfulness" with respect to the activities at issue (leading to the resurrection of a civil-criminal RICO distinction previously rejected by this Court in *Sedima*); (iii) the termination of racketeering activity prior to commencement of the lawsuit; (iv) the absence of multiple victims; (v) the

absence of a separate "pattern" as to each victim, notwithstanding allegations of multiple victims; and (vi) the absence of a "significant societal" injury. These judicially-created limitations have severely hampered the effectiveness of RICO, particularly in the area of white-collar wrongdoing, to an extent never envisioned by Congress or by this Court. They also have caused conflicts amongst the circuits, as the courts of appeal have struggled to limit civil RICO's reach beyond the broad and literal terms set forth in the statute.

A. Bright Line One-Year Rule

Many lower courts, including the Second Circuit in this case, have arbitrarily suggested that a duration of one year is an absolute prerequisite to constitute a "pattern". *See, e.g., Primary Care Inv., Seven v. PHP Healthcare*, 986 F.2d 1208, 1215 (8th Cir. 1993) (deeming ten-to-eleven month scheme insufficient merely on account of duration, holding that "[o]ther circuits have consistently held that the requirement of continuity . . . is not met if predicate acts extend less than one year"); *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992) (six- or seven-month scheme insufficient), *cert. denied*, 503 U.S. 832 (1992); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 953 F.2d 587, 593 (11th Cir.) (six months to a year insufficient), *reh'g denied*, 961 F.2d 224 (1992); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991) ("twelve months is not a substantial period of time" for purposes of establishing pattern of racketeering activity), *cert. denied*, 504 U.S. 955 (1992); *J.D. Marshall Int'l v. Redstart Inc.*, 935 F.2d 815, 821 (7th Cir. 1991) (thirteen months is not substantial under RICO); *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989) (predicate acts with single goal over one-year period do not form pattern).

The Second Circuit in its decision below indicated its agreement with this approach when allegedly faced with the following circumstances:

> . . . [A]llegations of a pattern of racketeering lasting at most from the time the defendants allegedly induced plaintiff to accept a promissory note in March

> 1990, until TFG's sale to TFG Acquisition in February 1991.
>
> As noted above, we have twice found closed-ended continuity since the Supreme Court's decision in *H.J. Inc.*, and in each case the alleged pattern extended for a longer period of time.
>
> * * *
>
> We are not prepared to conclude that the specific racketeering activities alleged in this case, occurring over less than one year and without a threat of future criminal activity, constitute the sort of 'long-term criminal conduct' that Congress sought to target in RICO.

GICC Capital Corp., 67 F.3d at 467, 469.

In addition to mischaracterizing the facts of the case -- GICC alleges that the looting scheme lasted more than two years, starting well before March of 1990, in mid-1989 when Respondents assumed control of CRI, and lasting until September of 1991 when the last overseas transfers were made -- the Second Circuit's bright-line one-year test is nowhere found in the RICO statute or in this Court's precedent. *See*, *supra*, part I.

While this Court has previously stated that "[p]redicate acts extending over a few weeks or months . . . do not satisfy the requirement," *H.J.*, 492 U.S. at 242, it has never engrafted anything amounting to a bright line one-year rule. Moreover, Justice Scalia's concurring opinion in *H.J.* criticized the majority opinion for allowing "a few months of racketeering activity (and who knows how much more?) . . . for free." *Id.* at 254 (Scalia, J., concurring). The lesson to be learned by future civil racketeers in light of the Second Circuit's decision here reflects Justice Scalia's criticism -- if you engage in a fraud, engage in it quickly and make sure it is over in less than a year. Nonetheless, there is not a shred of language in RICO to the effect that a one-year period is a minimum demarcation line.

Further, this unfounded one-year rule has led to a clear conflict amongst the circuit courts, most recently evidenced by the Second Circuit's opinion in this case, and the Ninth Circuit's decision in *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995), holding that a "bright line, one-year rule . . . would contradict the fluid concept of continuity enunciated by the Supreme Court in *H.J.*".[10]

The absence of support in either statutory text or Supreme Court precedent for this overly rigid one-year barrier, compounded by the clear circuit conflict that exists, necessitates the intervention of this Court.

B. Civil-Criminal Case Distinction

The lower courts also have also attempted to limit civil RICO's reach by adding an "inherently unlawful" qualification to the "pattern" analysis that has led to the application of different standards for civil as compared with criminal RICO cases, despite the fact that (i) such a distinction is not consistent with RICO's text, and (ii) previous attempts to create such a distinction have generally met with reversal by this Court. *H.J.*, 492 U.S. 229, 248-249 ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad range of perpetrators operating in many different ways."); *Sedima*, 473 U.S. 479, 499 (civil RICO is properly used against "respected and legitimate enterprises" since they "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."); *see Fleet Credit Corp. v. Sion*, 893 F.2d 441, 447 (1st Cir. 1990) (*H.J.*'s analysis permits RICO actions against "businessmen" for ordinary contract fraud claims, whenever those claims include specific allegations demonstrating a pattern of mail or wire fraud).

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[10] In *Allstate*, a recycling company sued its former officers under RICO, alleging that they and their families solicited kickbacks, received and distributed illicit gratuities and commissions, and created false receipts, thus overcharging the company for the transportation of goods and services. 65 F.3d 1523, 1526-27.

In the decision below, the Second Circuit suggested a distinction between civil and criminal RICO cases, as follows:

> An inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. . . . Where the nature of the conduct or the enterprise does not by itself suggest that the racketeering acts will continue, courts must look to other external factors.

GICC Capital Corp., 67 F.3d at 466 (citations omitted).

Such a distinction is not limited to this case. For example, in *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995), the Second Circuit held that a three-month scheme of embezzlement qualified as "inherently unlawful," thus constituting a RICO pattern,[11] while in *GICC Capital Corp.*, 67 F.3d 463, 469, the Second Circuit found that a two-year multi-faceted fraudulent conveyance scheme involving hundreds of instances of mail and wire fraud was not the "sort of long-term criminal conduct that Congress sought to target in RICO, and, therefore, would not constitute a RICO pattern."

Other circuits have also interpreted RICO's "pattern" requirement more generously in criminal than in civil cases, using a less than one-year test. *Compare United States v. Busacca*, 936 F.2d 232 (6th Cir.) (two-month period of embezzlement sufficed to evince a threat of continuity), *cert. denied*, 502 U.S. 985 (1991), and *United States v. Link*, 921 F.3d 1523 (11th Cir. 1991) (possession of drugs with intent to distribute on two occasions within one year held to be pattern), *cert. denied*, *D'Amico v. United States*, 500 U.S. 958

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[11] In *Aulicino*, the Second Circuit distinguished between enterprises on the one hand that are "inherently unlawful" and "were in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement" and those on the other hand that are "not inherently unlawful, such as frauds in the sale of property." The former, the Second Circuit suggested, have the required continuity "by the nature of the activity," regardless of the duration of the activity, while the latter require a longer duration. 44 F.3d at 1111.

(1991), *with Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir. 1994) (finding no threat of continuity where construction-contract fraud spanned 17 months), *cert. denied*, ___ U.S. ___, 115 S. Ct. 579 (1994), and *Aldridge v. Lily-Tulip, Inc. Salary Retirement Benefits Committee*, 953 F.2d 587, 593 (11th Cir.) (finding no pattern where employer's alleged improper termination of employees' benefits was accomplished during a six-month to one-year period), *reh'g denied*, 961 F.2d 224 (11th Cir. 1992).

Such a distinction is completely inconsistent with this Court's precedent. In *Sedima*, this Court expressly rejected an effort by the Second Circuit to engraft a criminal conviction requirement onto civil RICO claims. *See* 473 U.S. 479, 493 ("[w]e can find no support in the statute's history, its language or considerations of policy for a requirement that a private treble damages action . . . can proceed only against a defendant that has been criminally convicted."). Further, in *H.J.*, this Court wrote that the organized crime limitation on RICO had been discredited and could not be read into the statute. See 492 U.S. at 248-49 ("[i]t would be counterproductive and a misdemeanor of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus"). Thus, the Second Circuit's "inherently unlawful" test in GICC, in which criminal RICO cases are permitted to have shorter "patterns" than civil cases, threatens to resurrect these discredited doctrines.

Moreover, in making this "inherently unlawful" distinction, construing the "pattern" requirement more liberally in criminal than in civil cases, the lower courts have violated a well-established rule of statutory construction, namely that penal laws should be more strictly construed than civil laws. 3 Norman J. Singer, *Statutes and Statutory Construction*, § 59.03 (4th ed. 1986).

For these reasons as well, this Court should grant certiorari so as to resolve this conflict.

C. Termination of Racketeering Activity Prior to Commencement of Suit

The Second Circuit below also has followed erroneously the lead of the Sixth and Seventh Circuits in rejecting as a pattern conduct that is terminated on or before the commencement of litigation. *GICC Capital Corp.*, 67 F.3d at 466 (looting of corporate assets does not satisfy continuity requirement when there are no more assets to loot); *Thompson v. Paasche*, 950 F.2d 306, 311 (6th Cir. 1991) (defendants' scheme, which involved the sale of nineteen lots of property and was completed months prior to commencement of lawsuit, lacked requisite continuity); *American Eagle Credit Corp. v. Gaskings*, 920 F.2d 352, 354-55 (6th Cir. 1990) (applying "hindsight" analysis, court held that allegedly fraudulent sales of medical equipment occurring prior to lawsuit failed to satisfy continuity requirement); *Olive Can Co. v. Martin*, 906 F.2d 1147, 1152 (7th Cir. 1990) (threat of continuing activity only need be considered in the event the perpetrators are caught before the scheme is completed). Like the one-year rule and the civil-criminal distinction, the timing of the termination restriction is not supported by statutory text or by this Court's precedent and has caused further confusion regarding the "pattern" element within and amongst the circuits.

Such a requirement is a catch-22, ultimately penalizing the victims and benefitting the victimizers. For example, if a plaintiff files suit before enough time has elapsed to establish continuity, the threat of continued racketeering activity typically will not exist. *See*, *supra*, part II.A. It is only natural for the perpetrators to cease their RICO activity upon the commencement of litigation or the indictment of one or more of the participating respondents. Indeed, most fraudulent activity has some kind of natural ending-point. If the Second Circuit's hindsight analysis were adopted, civil RICO fraud claims would be all but impossible to plead.

To be consistent with *H.J.*'s "common-sense everyday" approach, other courts have recognized that a pattern must be

examined at the time of the activity rather than after the racketeering has ceased. *See, e.g., United States v. Busacca*, 936 F.2d 232, 238 (6th Cir.) (fortuitous interruption of criminal acts does not preclude a finding of open-ended continuity; long-term criminal conduct may be interrupted, by termination, the commencement of the RICO action, arrest, indictment or guilty verdict), *cert. denied, Busacca v. U.S.*, 502 U.S. 985 (1991); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 n.4 (9th Cir. 1987) ("the fact that the last of a series of predicate acts may have completed the criminal scheme does not necessarily preclude a finding of continuity"). Otherwise, the pattern requirement would rarely be satisfied, as commencement of litigation or prosecution usually brings about termination of the illicit conduct.

Only this Court can determine whether the "timing of termination" requirement is supported by the statute and judicial precedent. GICC submits that it is not.

D. Other Confusing and Conflicting "Pattern" Tests Also Exist

Several other tests, not directly adopted by the Second Circuit in this case, have nevertheless been employed by other circuits to limit civil RICO's reach in a confusing and conflicting manner. Granting certiorari in this case can assist other circuits in interpreting what is a "pattern" under RICO.

1. Absence of Multiple Victims and/or Multiple Schemes

Some courts have rejected an otherwise well-pleaded pattern because of the absence of multiple victims. *See Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir. 1994) (finding that "defendant who engage[d] in several different forms of fraud for a single purpose, to defraud a single victim through activities surrounding one construction project" over a seventeen-month period, did not meet pattern requirement"), *cert. denied*, ___ U.S. ___, 115 S. Ct. 579 (1994); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684-85 (4th Cir. 1989) (if case involves "but one perpetrator," "but one set of victims" and

"actions... narrowly directed to a single fraudulent goal," the pattern requirement is not met); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266-68 (7th Cir. 1990) (finding that defendant's several acts of mail and wire fraud did not meet pattern requirement since there was only one victim).

Contrary to these decisions, there is no support for the conclusion that the number of victims should be determinative of the pattern element. *See, e.g., Uniroyal Goodrich Tire Corp., v. Mutual Trading Corp.*, 63 F.3d 516, 524 (7th Cir. 1995) ("[t]he repeated infliction of an economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO"), *cert. denied, Mutual Trading Corp. v. Uniroyal Goodrich Tire Corp.*, ___ U.S. ___, 116 S. Ct. 916 (1996); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990) (*H.J.* did not allude to other factors, such as the number of victims or the variety of acts).

Like the multiple-scheme requirement rejected by *H.J.*, the multiple-victim analysis is equally irrelevant; it "appears nowhere in the language or legislative history of the Act." *H.J.*, 492 U.S. at 241.

2. Absence of a "Pattern" as to Each Victim

Some courts have declined to consider predicates involving victims other than the named plaintiff, holding that a pattern may consist only of predicates involving the plaintiff. See, e.g., *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 n.4 (9th Cir. 1992) (holding that plaintiff lacked "standing to assert the wrongs done to another party"); *Feinstein v. RTC*, 942 F.2d 34, 46 (1st Cir. 1991) ("duration must be measured by the particular respondent's fraudulent activity, rather than by otherwise innocuous or routine mailings that may continue for a long period of time thereafter"). Under this reasoning, a perpetrator who injures hundreds or thousands of victims can escape RICO liability if he is careful to injure each victim only once.

Other circuit courts, namely the First, Third and Seventh, have vehemently disagreed with this misguided interpretation of the "pattern" element, a further example of the conflicts

amongst the circuits and the absolute need for resolution by the Court. *See, e.g., Town of Earney v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987) (pattern may include victims other than plaintiff); *Marshall & Isley Trust Co. v. Pate*, 819 F.2d 806, 809 (7th Cir. 1987) (victim not required to show injury directly resulting from all predictate acts constituting pattern). ". . .[N]owhere in either the text of RICO or the case law is there any suggestion that *each victim* of an alleged pattern of racketeering activity must have suffered at least two predicate acts at the hands of the defendant." *Libertad v. Welch*, 53 F.3d 428, 438 n.5 (1st Cir. 1995).

3. Absence of Significant Societal Threat

Some courts have implied that, even if the technical requirements of RICO are otherwise met, the case may be rejected for lack of a pattern if the conduct at issue does not pose a "significant societal threat." *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1267-68 (7th Cir. 1990) (although numerous acts of extortion, mail and wire fraud were committed, pattern not found because defendant did not pose a "significant social threat"); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 596-97 (3d Cir. 1990) ("[g]iven its natural and common sense approach to RICO's pattern element, we think it unlikely that Congress intended RICO to apply in the absence of a more significant societal threat"); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (must show that "ongoing unlawful activities . . . pose a special threat to social well-being"). Such a subjective standard would inevitably become a latent organized crime limitation, something which *Sedima* and *H.J.* disfavored completely.

* * *

It is evident that, in the seven years since this Court's decision in *H.J.*, there is still substantial confusion in the lower courts as to what constitutes a RICO "pattern." This confusion involves a significant issue of federal law, which is of considerable practical importance to large numbers of judges and litigants. GICC submits that the time has come for this

Court again to sort out the law on this issue by granting certiorari in this case.

III. The Decision of the Court of Appeals is Erroneous and Conflicts With the Court's Own Decision on a Prior Appeal

An additional reason to grant certiorari is that the Second Circuit's decision is in conflict with that court's decision of a prior appeal in the very same case. Other federal courts seeking to interpret the Second Circuit's decision will be faced with two very different descriptions of the facts, leading them to wonder to which set of facts the "pattern" principles enunciated in the second decision should be applied. Thus, in addition to being in conflict with decisions from other circuits, the Second Circuit's irreconcilable decisions threaten to foment additional confusion and further conflict in the future.

On the first appeal in this case, the Second Circuit referred to the "timing," "magnitude" and "rapacious nature of the looting," which it held on that appeal "fairly posit[ed] the directness of injury required for RICO standing." *GICC Capital Corp.*, 30 F.3d 289, 293 (2d Cir. 1994). There, the court specifically described the case as involving "a series of transactions by the [Respondents] from 1989 to 1991 [which] fraudulently stripped TFG of its assets and inevitably resulted in TFG's default on the note." 30 F.3d at 291. A "series of transactions," to a layperson, is a "pattern." And mid-1989 to the fall of 1991 is the period of the pattern alleged by GICC, running from when Respondents first took control of TFG and CRI, to when their overseas transfers ceased by entry of a temporary restraining order by the District Court.

On the second appeal, however, the Second Circuit held that while GICC had standing to assert a RICO claim, it had not stated one. *GICC Capital Corp.*, 67 F.3d at 466. The manner in which the Court of Appeals construed the facts on the second appeal assumed critical importance in its conclusion that GICC had not adequately alleged open-ended and closed-ended continuity. This court misconstrued the facts, as follows:

> We first examine the temporal aspect of plaintiff's claim. GICC alleges a two-year period of racketeering activity; GICC variously identifies the starting point of that period as (1) the individual CRI defendants' takeover of CRI (in June 1989); (2) the transfer of Apple Leasing Co. to CRI (at an unspecified time between June 1989 and March 1990); and (3) the issuance of a promissory note in favor of GICC (in March 1990). Because GICC does not allege any racketeering activity in connection with the individual CRI defendants' takeover of CRI, the takeover cannot form the starting point of defendants' pattern of racketeering activity. GICC attempts to plead violations of the mail and wire fraud statutes in connection with the transfer of Apple Leasing from TFG to CRI. However, GICC alleges that the transfer was "fraudulent" in the sense that it was not disclosed to GICC prior to GICC's acceptance of the promissory note. Based on the amended complaint, we cannot conclude that plaintiff has alleged mail and wire fraud in connection with the actual transfer of Apple Leasing from TFG to CRI. We are left, then, with allegations of a pattern of racketeering lasting at most from the time the defendants allegedly induced plaintiff to accept a promissory note in March 1990, until TFG's sale to TFG Acquisitions [sic] in February 1991.

GICC Capital Corp., 67 F.3d at 467.

By describing the pattern of fraudulent conveyances in this fashion -- inaccurately -- the Second Circuit shortened the pattern and made it more discrete, thus buttressing its conclusion that there was no adequate allegation of continuity. The mid-1989 takeover of CRI and the transfer of Apple were necessary parts of the fraudulent conveyance scheme and thus a part of the RICO "pattern" (App., *infra*, 37a-38a, 40a). And the scheme did not come to an end merely when the investor repurchases ceased; TFG had to be sold and cast adrift, which it was in February of 1991, and the funds had to be secreted,

which they were until the fall of 1991 (App., *infra*, 40a-44a). The Second Circuit in its second opinion thus curtailed both the start and the end of the "pattern" in stark contrast to the accurate description articulated in its first opinion.

We are cognizant that this Court does not grant certiorari to become enmeshed in the factual details of a particular case. However, by describing the fraud as lasting from mid-1989 to the fall of 1991 in the first opinion, and then shortening it to March 1990 to February 1991 in the second opinion, the Second Circuit's second opinion will exacerbate future confusion over the meaning of RICO's "pattern" requirement. Lower courts will have to ask whether there really is a minimum one-year civil RICO "pattern" test, and if so, whether in light of the facts described in the first Second Circuit opinion it is really a two-year test. Avoiding the difficulties which such future confusion will present makes this, GICC submits, an especially compelling case for this Court to grant certiorari. Not only can granting certiorari in this case resolve past Circuit conflicts over construction of RICO's "pattern" requirement, it also can prevent future confusion and additional conflicts as well, which the Second Circuit's opinions will undoubtedly engender if certiorari is not granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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